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IN THE

Supreme Court of the United States

October Term, 1946
No. 1326

JAMES E. HENDERSON, as Executor of the Last Will and Testament of Nellie Euretta Taylor, Deceased,

Petitioner,

vs.

ETHEL STRICKLAND ROGAN, Individually and as Executrix of the Last Will and Testament of Nat Rogan, former United States Collector of Internal Revenue for the Sixth Collection District of California.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

TODD W. JOHNSON,
622 Title Insurance Building, Los Angelse 13.
Attorney for Petitioner.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

James E. Henderson, Executor of the Last Will and Testament of Nellie Euretta Taylor, Deceased, by his counsel, respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Ninth Circuit entered in this case on February 8, 1947, affirming a decision of the District Court of the United States for the Southern District of California, Central Division.

Opinions Below.

The memorandum opinion of the District Court [R. 333-336], as modified by that Court on March 1, 1946 [R. 361], is unreported. The opinion of the Circuit Court of Appeals [R. 659] has not yet been reported.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on February 8, 1947 [R. 658]. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

The question is whether the Circuit Court erred in holding that the value of the remainder of the corpus of trust No. 1059, established February 6, 1931, by George Wesley Taylor out of his own separate property, is subject to the Federal estate tax in the estate of his wife, Nellie Euretta Taylor, the decedent herein, under the last portion of Clause (2) of Section 302(f) of the Revenue Act of 1926 as a transfer "intended to take effect in possession or enjoyment at or after" her death by virtue of her exercise, by deed on April 7, 1932, of a power of appointment with respect to the remainder of such trust fund.

Statute and Regulation Involved.

The relevant provisions of the statute and regulation involved are set forth in the Appendix, *infra*.

Statement.

The trial court's findings of fact were based upon stipulations and oral testimony and, except the ultimate fact, are not in dispute.

The taxpayer is the executor of the Last Will and Testament of Nellie Euretta Taylor, decedent herein. In January, 1931, decedent's husband, George Wesley Taylor, inherited property of substantial value [R. 229], all of which was his *separate* property [R. 60]. Upon his receipt of such inheritance, said George W. Taylor divided the same into two substantially equal portions [R. 229], one of which *he* placed in said trust No. 1059 on February 6, 1931 [Ex. 1, R. 12], and the other half of said inheritance (the taxability of which is *not* here involved) was on the same date placed in another trust [Ex. 13, R. 123].

The decedent, Nellie Euretta Taylor, died without issue on January 27, 1936, at the age of 60, a resident of Beverly Hills, California [R. 59, 87, 121]. Her husband, George W. Taylor, predeceased her on March 16, 1932 [R. 60].

In his Trust 1059 (the one here in controversy), said George W. Taylor named his wife, the decedent herein, as life beneficiary [R. 13] and directed that the net income be paid to her until her death [R. 61]. George W. Taylor affixed his signature to his trust as "Trustor," and the signature of the decedent as "Wife of Trustor" was affixed immediately after that of her husband [R. 21]. The trustee of Trust 1059 had the sole power to invade the corpus of the trust for the support of the decedent [R. 15]. Neither the trustor nor the decedent had any power at any time to invade the principal of said trust

fund, nor could either of them change the terms of the trust agreement.

By paragraph III of the trust indenture [R. 14], George W. Taylor granted and reserved to the decedent the power of appointment of that portion of the principal and income of the trust estate *remaining in the trustee's hands "after her decease,* to be exercised *not by Will, but only* by the last, unrevoked written instrument exercising such power and on file with the Trustee at the time of her death" [R. 14]. This power could be exercised by the decedent from time to time, and each such exercise could be revoked [R. 14]. Failing such an appointment, the trustor directed that upon this decedent's death the remainder of the trust fund should be distributed to her heirs at law [R. 14]. The trust was to terminate upon the death of the last survivor of the trustor and the beneficiary [R. 14].

Each beneficiary was restrained from anticipating, encumbering, alienating or in any other manner assigning his interest, nor was such interest subject to the liabilities of the beneficiary, or to judgment or other legal process [R. 15]. The trust also provided that it should not nor could not be terminated or modified in any manner, but was to remain *irrevocable* until the full expiration of its term [R. 20].

Upon the death of the decedent herein, the trustee had the sole discretionary power to use the trust fund for the payment of taxes without respect to the estate of the decedent unless otherwise directed by the decedent in her exercise of the power [R. 13].

The title to, and the possession of, the trust corpus was *exclusively and irrevocably* in the trustee bank where it

was placed by George W. Taylor on February 6, 1931. The decedent had no ownership in, or right to the possession of, the corpus of the said trust property at any time during her life.

On February 7, 1931, the very next day after the trust was established by George W. Taylor, his wife, decedent herein, exercised the power of appointment in favor of her husband [R. 26] who was then alive. The record fails to show why she made this appointment so soon, or why it was made in favor of her husband, but a very reasonable inference is that her husband so directed.

As a result of the death of her husband on March 16, 1932, *and at the instance and insistence of the trustee bank* for its protection and in order for it to continue in control of the trust property [R. 582], the decedent, on April 7, 1932, executed an instrument and filed the same with the trustee bank on the same date in which she revoked her aforesaid exercise of the power of appointment of February 7, 1931, and appointed the remainder of the trust property to her estate [R. 27] to be distributed according to her last will or, if she died intestate, to her heirs at law. At no time prior to her death did the decedent revoke the said instrument of April 7, 1932 [R. 364], and in due time the remainder of the said trust was distributed to her executor [R. 9].

Immediately after her husband's death (March 16, 1932 [R. 60]), the trustee bank *prepared* and presented to decent for her signature a number of papers required by the changed conditions resulting from her husband's death [R. 581]. Among such papers was one for exercising *anew* the power of appointment [R. 583]. The decedent took these papers to her old friend and attorney,

Robert M. Fulton, for his reaction. This caused the delay until April 7, 1932, in exercising anew the power of appointment. At that time, decedent thought it was unnecessary to again exercise the power of appointment because she believed that as a result of her husband's death the trust fund then belonged to her, but after consultation with her personal attorney, and with his concurrence in the trustee's said request, the decedent again exercised the power on April 7, 1932 [R. 27, 585], or only 3 weeks after her husband's death.

Decedent's failure to appoint the remainder of the trust fund to specifically named persons was due to her then uncertainty as to her wishes in the premises and, also, because she had not by that time had an opportunity to consider such matters as her husband had been dead for only 3 weeks. Also, the trustee bank was then insisting upon prompt action by the decedent in this important matter [R. 587]. Decedent's previous appointment of February 7, 1931, was no longer effective because of her husband's death. She exercised the power of appointment on April 7, 1932, at the request of the trustee bank, concurred in by her personal attorney, as a safeguard and not with any intent on her part that it be *effective* at her death for indeed she had no discretion as to the effective date despite the words used which necessarily had to conform with the trust instrument's directions. Also, the deed of April 7, 1932, followed the pattern of the deed of February 7, 1931. In thus appointing the remainder of the trust fund to her estate she met the then pressing demands of the trustee bank, and, at the same time, allowed herself ample time to decide upon the new beneficiaries. This she accomplished by her will executed September 15, 1934, or some two years and five months later [R. 31].

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred:

1. In holding and deciding that the deed of April 7, 1932, was effective only at decedent's death and that such effective date resulted only from decedent's "intention" that her deed take effect in possession or enjoyment at or after her death within the meaning of the last portion of Clause (2) of Section 302(f) of the Revenue Act of 1926.

2. In failing to hold and decide that if the transfer of the remainder of the trust were "intended to take effect in possession or enjoyment at or after" decedent's death, such intention was that of the trustor—not that of the decedent herein.

3. In holding and in deciding that the "fact that in the case at bar the power was to be exercised by deed and not by will * * * would," in the Circuit Court's opinion, "make no difference."

4. In holding and in deciding that the circumstances of the case at bar "are covered by the statute in question with such precision that a mere comparison of the undisputed facts with the statutory language is sufficient to demonstrate that the property was subject to the estate tax because the power was exercised by deed and was intended to take effect in possession or enjoyment at or after decedent's death."

5. In imputing to the decedent the "intention" that her exercise of the power of appointment be effective at or after her death, notwithstanding the undisputed fact that decedent's husband, the creator of the trust, *and he alone*, had previously irrevocably fixed the date of his wife's

death (the decedent herein) as the date on which the remainder of the trust fund was to come into the "possession" or "enjoyment" of the remaindermen to be named by the decedent, thereby most effectively depriving the decedent of any power whatever to exercise any "intention" with respect to the effective date of the passing of the remainder of the appointed property.

6. In failing to follow and apply the well known rule that doubts as to the applicability of a taxing statute in a given case must be resolved in favor of the taxpayer.

Reasons for Granting the Writ.

1. Despite the fact that the Federal estate tax has been in existence continuously since September 8, 1916, no case directly in point has been found, and no case directly in point was cited to the trial court or to the Court of Appeals by either party. The question involved in the instant case, therefore, appears never to have been considered by any court prior to the instant case. The amount of tax involved in this case is quite substantial, there being $210,000.00 in principal which, with interest from the date of payment, presently involves a total of more than $300,000.00. It is important, therefore, not only from the standpoint of the very substantial monetary interest of the taxpayer, but also from the standpoint of the Government and other taxpayers, that the question presented herein be passed upon by this court so that the law on the question presented may be authoritatively and finally settled. Unless this Court reviews and passes upon the lower courts' decisions in this case, this taxpayer will necessarily be placed in the anomalous position of having paid a very substantial tax without the benefit of consid-

eration and decision by this Court of the taxing statute involved.

2. Under the undisputed facts in this case, George W. Taylor, husband of the decedent herein, established said Trust No. 1059 out of his own separate property and empowered the decedent herein to appoint the remainder of the trust fund only "after her decease, to be exercised not by Will, but only by the last, unrevoked written instrument exercising such power and on file with the Trustee at the time of her death." The decedent was bound as a matter of law and fact to adhere strictly to her husband's said directions in his trust instrument in all its particulars and, in so doing, she could not under any circumstances have exercised her own independent will or judgment as to the date upon which the remainder of the trust fund should be distributed to her appointees. Decedent's only power was to name the remaindermen—not to fix the effective date they would come into the possession or enjoyment of the remainder. This important point was entirely overlooked by the Circuit Court. If the exercise of the power of appointment actually took effect in possession or enjoyment at or after decedent's death, such result flowed entirely from George W. Taylor's intentions and instructions. The tax could not attach under such circumstances in decedent's estate because she had no power to make her act effective in possession or enjoyment at or after her death and could not have had any such "intention." The deed of April 7, 1932, was effective when executed. (*Jones v. Clifton*, 101 U. S. 225; *Shukert v. Allen*, 273 U. S. 545; *May v. Heiner*, 281 U. S. 238.) No property *passed* at the date of the decedent's death as such passing occurred when George W. Taylor

placed his own separate property in trust with *irrevocable* title in the trustee.

3. The Taxing Act quite obviously places in different categories powers of appointment exercised by will and those exercised by deed. An examination of the statute (Section 302(f), Revenue Act of 1926) will clearly show that powers of appointment exercised by deed are subject to the Federal estate tax *only if* the deed were executed by the decedent (as applied to the facts of this case) in such manner as to be *intended* by the *decedent* to take effect in possession or enjoyment at or after her death. The "intention" of *another* person (in this case her husband) is wholly immaterial. Since decedent was bereft of any power to fix the effective date, she could not possibly have "intended" her act to be effective after her death within the meaning of the taxing statute.

4. The meaning of the word "intended," appearing in the taxing statute [see Appendix], is quite important to a correct decision and since, as above stated, the decedent's death was definitely and irrevocably fixed by George W. Taylor, the trustor—not by decedent—as the date upon which the remainder interest in *his* trust fund could be distributed to his wife's appointees, it necessarily follows that the value of the appointed property does not fall within either the express language or intent of the taxing statute. Property appointed by deed is subject to the Federal estate tax *only* where the person exercising the power is free to fix the date of effectiveness of such appointment *and* then only if he "intends" that it be effective at or after his death. Otherwise the statutory word "intended" would be meaningless. In the case at bar, the decedent had no such power, and had she attempted to fix

a date different from that already irrevocably fixed by her husband in his Declaration of Trust, such an act on her part would have been a nullity.

5. Congress did not intend to subject to the Federal estate tax all exercises of powers of appointment, but *only* those clearly falling within the language of the taxing statute. The soundness of this position is clearly demonstrated by the express language of the statute quoted in the Appendix. This case does not involve an attempted evasion or avoidance of a tax already imposed as sometimes occur. The property in the trust fund never belonged to this decedent, but was the separate property of her husband. Her husband's Declaration of Trust specifically provided that the remainder should go to the decedent's heirs-at-law if she failed to exercise the power of appointment during her lifetime. Had the decedent failed to exercise the power of appointment, the tax could not possibly have attached, nor can the tax possibly attach unless it is clear that the *decedent* "intended," as the result of an exercise of her independent judgment and freedom of choice as to date (which she did not have), that the remaindermen come into "possession" or "enjoyment" of the remainder after her death. The undisputed facts do not justify any conclusion that the tax attaches. The decedent's failure to name specific appointees in her exercise of the power was due to the fact that her deed was executed at the instance and insistence of the trustee bank within a few days after her husband's death, and at a time previous to which she had had no opportunity to consider the persons to whom she wished to appoint. Therefore, she adopted the only expedient then open to her (after her husband's death), which was to name her executor as beneficiary of the remainder.

6. The Circuit Court overlooked the well settled rule that a very strict construction is applied against the Government where there is a reasonable doubt whether a particular section of the Revenue Act imposes a tax. (*Gould v. Gould,* 245 U. S. 151; *Hassett v. Welch* (1938), 303 U. S. 303; *Smietanka v. First Trust & Savings Bank,* 257 U. S. 606; *Shwab v. Doyle,* 258 U. S. 529, and many other cases.)

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari be granted.

Respectfully submitted,

TODD W. JOHNSON,
Attorney for Petitioner.

Dated: April, 1947.

APPENDIX.

Revenue Act of 1926, Ch. 27, 44 Stat. 9:

"SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * * * *

(f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a *bona fide* sale for an adequate and full consideration in money or money's worth; and"

Regulations 70 (1926 Edition):

"Art. 24. General rules.—The value of all property passing under a general power of appointment must be included in the gross estate of the person exercising the power (known as the donee, or appointor) where the power is exercised by will. It should also be so included when the power is exercised by deed or other instrument executed in contemplation of, or intended to take effect in possession or enjoyment at or after, the death of the donee of the power. The statute, however, does not require inclusion within the gross estate of the value of the appointed property in the case of a *bona fide* sale thereof by the donee of the power for an adequate and full consideration in money or money's worth.

"If the power is exercised for a consideration in money or money's worth, but is not a *bona fide* sale

for an adequate and full consideration in money or money's worth, there should be included in the gross estate only the excess of the fair market value, at the time of decedent's death, of the property passing under the power over the value of the consideration received by the decedent.

"Only property passing under a general power should be included. Ordinarily a general power is one to appoint to any person or persons in the discretion of the donee of the power. Where the donee is required to appoint to a specified person or class of persons, the property should not be included in his gross estate. Where the decedent died prior to the effective date of the Revenue Act of 1918, the value of the appointed property is not to be so included. Duplicate copies of the instrument granting the power and of the instrument by which the power was exercised, one of each to be certified or verified, must be filed with Form 706 in all cases, unless the decedent was a nonresident, in which case only one copy of each instrument, certified or verified, is required."